John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, Idaho 83701-21239
Telephone (208) 336-0700
Facsimile (208) 344-6034

Attorneys for Clear Springs Foods, Inc

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE SECOND MITIGATION PLAN OF THE NORTH SNAKE AND MAGIC VALLEY GROUND WATER DISTRICTS TO COMPENSATE SNAKE RIVER FARMS (Water District Nos. 130 and 140)	**CLEAR SPRINGS FOODS, INC.'S SUPPLEMENTAL AUTHORITY**

COMES NOW, CLEAR SPRINGS FOODS, INC. ("Clear Springs"), by and through its attorneys of record, Barker Rosholt & Simpson, LLP, and hereby submits this *Supplemental Authority and Comment* as a follow-up to its initial brief filed on March 2, 2009 in this matter.

I. The Ground Water Districts' Money Plan Should Be Dismissed Pursuant to the Doctrine of Judicial Estoppel.

The Ground Water Districts, as members of the Idaho Ground Water Appropriators, Inc. ("IGWA"), petitioned to intervene in the litigation over the facial constitutionality of the Department's Conjunctive Management Rules on August 29, 2005, *AFRD #2 v. IDWR*, Case No. 2005-600 (Gooding Cty. Dist. Ct., 5th Jud. Dist.). *See* **Exhibit A** (excerpts of petition to

intervene). During that proceeding, IGWA submitted a *Memorandum in Response to Plaintiffs' Motions for Summary Judgment* and represented to the District Court that the Department's CM Rules were constitutional. In its *Memorandum*, IGWA specifically represented the following with respect to authorized mitigation under the CM Rules:

> No where do the Rules speak to cash mitigation. They refer to actions that will "prevent injury to senior rights," by providing replacement water at the time and place required by the senior priority right. Rule 43.03.a-c. ***The mitigation provisions of the Rules in no way suggest that money can be imposed as mitigation***.

IGWA's Memorandum in Response ("*IGWA Memo*") at 45 (emphasis added). *See* **Exhibit B** (cited excerpt).

Even though the Ground Water Districts agreed with the applicable law and Clear Springs, asserting that the Rules "in no way suggest that money can be imposed as mitigation", they now argue just the opposite to the Director. *See Ground Water Districts' Objections and Brief in Support of Mitigation Plan Providing "Other Appropriate Compensation"* ("*GWD Brief*"). Citing Rule 43.03(c) in the *AFRD #2* case, the Ground Water Districts agreed that the Rule refers to "actions that will 'prevent injury to senior rights' by providing replacement ***water*** at the time and place required by the senior priority right." *IGWA Memorandum* at 45 (emphasis added). Now, the Ground Water Districts disavow this representation to the Gooding County District Court and go so far to claim the Rule "must mean something other than replacement water". *GWD Brief* at 8. Idaho law prohibits a party from taking such inconsistent positions for purposes of a litigation advantage. Accordingly, the doctrine of judicial estoppel bars the Ground Water Districts' Money Plan.

In *Heinze v. Bauer*, 178 P.3d 597 (Idaho 2008), the Idaho Supreme Court described the doctrine of judicial estoppel and the purpose it serves for the "orderly administration of justice and regard for the dignity of judicial proceedings." 178 P.3d at 600. The Court explained:

> This Court adopted the doctrine of judicial estoppel in *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954). In *Loomis*, this Court held that a litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter. *Id.* at 93-94, 277 P.2d at 565. Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." . . . Judicial estoppel is intended to prevent a litigation from playing fast and loose with the courts.
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> * * *
>
> ***Judicial estoppel is intended to prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action.***

178 P.3d at 600 (emphasis added).

Since the Ground Water Districts previously represented that the CM Rules were constitutional because they did not allow for "money mitigation", they are now estopped from deliberating shifting their position to gain the approval of the Money Plan. The Ground Water Districts are precluded from taking this position now just to "suit the exigencies" of this mitigation plan proceeding. Furthermore, such shifting positions warrant dismissal of the Money Plan, as a matter of law. *See Heinze, supra* (granting summary judgment and dismissing an action, with prejudice, based on the doctrine of judicial estoppel). Accordingly, the doctrine of judicial estoppel provides another basis for the Director to dismiss the Money Plan with prejudice.

II. Participation in the Water District 1 Rental Pool is Voluntary.

The Ground Water Districts claim that the Water District 1 Rental Pool Procedures provide support for their Money Plan concept since the rules provide for "impacts" to storage space holders from a prior year's rentals. *GWD Brief* at 14-15. The Ground Water Districts' analogy is misplaced and without merit. Although the Rental Pool Procedures provide for monetary payment from the "Impact Fund" to affected storage space holders, participation in the

rental pool is voluntary and optional. *See* Rule 5.2. Therefore, a storage space holder is not required to participate in the rental pool. Since a storage space holder must first "elect" to participate in the rental pool in order to receive payment from the "Impact Fund", it is not like the current case where the Ground Water Districts seek to provide "money" to an injured senior water right instead of water over the senior's objection. If a storage space holder in Water District 1 did not want to participate in the rental pool it would not have to accept "money" instead of water, as suggested by the Ground Water Districts.

DATED this 5th day of March, 2009.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2009, I served a true and correct copy of the foregoing **CLEAR SPRINGS FOODS, INC.'S SUPPLEMENTAL AUTHORITY**, in the manner indicated below, addressed to the following:

Via E-Mail

Randall C. Budge
Candice M. McHugh
RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
201 E. Center Street
P.O. Box 1391
Pocatello, ID 83201
Email: rbc@racinelaw.net
cmm@racinelaw.net

Justin May
MAY SUDWEEKS & BROWNING
PO Box 6091
Boise, ID 83707
Email: jmay@may-law.com

Tom Arkoosh
ARKOOSH LAW OFFICES, CHTD.
PO Box 248
Gooding, ID 83330
Email: tarkoosh@cableone.net

Kent Fletcher
FLETCHER LAW OFFICE
PO Box 248
Burley, ID 83318
Email: wkf@pmt.org

Daniel Steenson
RINGERT CLARK, CHTD.
PO Box 2773
Boise, ID 83702
Email: dvs@ringertclark.com

Travis L. Thompson
BARKER ROSHOLT & SIMPSON LLP
P.O. Box 485
Twin Falls, Idaho 83303-0485
Email: tlt@idahowaters.com

Via First Class Mail (postage prepaid)

Mark Daily
Idaho Aquaculture Association, Inc.
PO Box 767
Hagerman, ID 83332

Paul L. Arrington

Exhibit
A

Jeffrey C. Fereday (Idaho State Bar # 2719)
Michael C. Creamer (Idaho State Bar # 4030)
Brad V. Sneed (Idaho State Bar # 6254)
GIVENS PURSLEY LLP
601 Bannock Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

Attorneys for Idaho Ground Water Appropriators, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

AMERICAN FALLS RESERVOIR DISTRICT #2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, AND TWIN FALLS CANAL COMPANY, Plaintiffs, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL DREHER, its Director, Defendants.	Case No. CV-2005-600 **IDAHO GROUND WATER APPROPRIATORS, INC.'S PETITION TO INTERVENE** Fee Category: J-5 Fee: $55.00

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its attorneys Jeffrey C. Fereday, Michael C. Creamer and Brad V. Sneed of the law firm of Givens Pursley LLP and pursuant to Idaho Rule of Civil Procedure 24, hereby moves to intervene in the above-captioned matter. Specifically, IGWA moves to intervene as a matter of right pursuant to Rule 24(a). In the alternative, IGWA moves for permissive intervention under Rule 24(b). The grounds for this

motion are stated herein. This motion also is accompanied by IGWA's Answer, pursuant to Rule 24(c).

1. IGWA Is Entitled To Intervention Of Right Under IRCP 24(a).

Idaho Rule of Civil Procedure 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

IRCP 24(a). IGWA is entitled to intervene in this case as a matter of right under the second basis provided in Rule 24(a) because: (1) IGWA has significantly protectable interests relating to the property or transaction involved in this action and disposition of this action may adversely affect IGWA's interests; (2) this motion is timely; and (3) the existing parties do not adequately represent IGWA's interests.

A. IGWA's interests relate directly to the matters involved in this action and its disposition may adversely affect IGWA's interests.

IGWA's interests are directly and substantially related to the matters at issue in this case based on Plaintiffs' allegations and requested relief. IGWA is an Idaho non-profit corporation, organized to promote and represent the interests of Idaho ground water users. IGWA's members include six ground water districts, one irrigation district, cities, industries, and municipal water providers whose members rely on ground water.[1] Most of IGWA's members hold water rights

[1] The ground water districts, which together account for approximately 855,000 acres of irrigated farmland, include the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, Bonneville-Jefferson, and Madison Ground Water Districts. The cities include American Falls, Blackfoot, Jerome, and Post Falls. In addition, IGWA members include Anheuser-Busch (which pumps ground water for its malt plant in Idaho Falls), United Water Idaho (Idaho's largest municipal water supplier), and Jerome Cheese Company (which pumps ground water for its cheese factory in Jerome County).

Exhibit
B

Jeffrey C. Fereday (Idaho State Bar # 2719)
Michael C. Creamer (Idaho State Bar # 4030)
John M. Marshall (Idaho State Bar # 5628)
Christopher H. Meyer (Idaho State Bar # 4461)
Brad V. Sneed (Idaho State Bar # 6254)
GIVENS PURSLEY LLP
601 Bannock Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

Attorneys for Idaho Ground Water Appropriators, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

AMERICAN FALLS RESERVOIR DISTRICT #2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, AND TWIN FALLS CANAL COMPANY,

Plaintiffs,

and

THOUSAND SPRINGS WATER USERS ASSOCIATION, INC., RANGEN, INC., CLEAR SPRINGS FOODS, INC.

Plaintiff-Intervenors,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL DREHER, its Director,

Defendants

and

IDAHO GROUND WATER APPROPRIATORS, INC.

Defendant-Intervenor.

Case No. CV-2005-600

IGWA'S MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

word on the question of whether mitigation and mitigation plans comport with Idaho law, not the bare declarations of Plaintiffs.

As authority for criticizing the concept of mitigation (other than Plaintiffs' charge of illegal rulemaking)[18] Plaintiffs cite to a comment from the SRBA Court's 1999 "facility volume" decision. *Order on Challenge of "Facility Volume" Issue and "Additional Evidence" Issue*, Dist. Ct. 5th Jud'l Dist., Subcase nos. 36-02708 et al (1999). The SRBA Court in that opinion appeared to base its comment concerning mitigation not on the situation where a "mitigation plan" under the Rules was being proposed (one was not proposed), but on the suggestion that money might be used to mitigate for lack of water. No where do the Rules speak to cash mitigation. They refer to actions that will "prevent injury to senior rights," by providing replacement water at the time and place required by the senior priority right. Rule 43.03.a-c. The mitigation provisions of the Rules in no way suggest that money can be imposed as mitigation. In any event, the SRBA court's comment is inapposite because the Legislature since has acted in passing section 42-223, and because the Legislature previously had approved the use of mitigation in the context of ground water districts, enlargement amnesty, and water administration.

It is not surprising that Plaintiffs level a substantial amount of their criticism at the Rules' mitigation provisions. After all, how can it be said that any significant portion of the Rules violates Idaho law if the Director has authority to consider and implement mitigation plans? To recognize the Department's authority to consider plans "for mitigation purposes approved by the

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[18] SWC argues that the Director's "replacement water plan" obligation imposed on IGWA's members and others in his emergency order issued May 2, 2005 constitutes "unlawful rulemaking" in violation of Idaho's Administrative Procedure Act. SWC Brief at 50. However, even if this charge were well-founded in law, which it is not, it would be irrelevant to this Court's consideration of whether the Rules are facially unconstitutional or in violation of a statute. That complaint would have to await an "as applied" challenge.